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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 167

PAUL J. ZIEGLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 655-676) is reported at 174 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1949 (R. 677), and a petition for rehearing was denied on June 9, 1949 (R. 678). The petition for a writ of certiorari was filed on July 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the affirmance of petitioner's conviction was based upon a theory which was excluded in the trial court and, therefore, not passed upon by the jury.

REGULATIONS INVOLVED

General Ration Order No. 8, as amended, of the Office of Price Administration provided in pertinent part as follows:

> Sec. 2.9 *Transfer in exchange for invalid or improperly acquired ration document.* No person shall transfer or receive any rationed commodity in exchange for a ration document if he knows or has reason to believe that the ration document was not validly issued or that it was not acquired in accordance with a ration order by the person tendering it. [8 F.R. 3784.]

Third Revised Ration Order No. 3, as amended, of the Office of Price Administration, provided in pertinent part as follows:

> Sec. 15.7 *Issuance and use of checks*— * * *
>
> * * *
>
> (d) *Overdrafts prohibited.* No check may be issued for an amount larger than the balance in the account on which it is drawn less the amount of outstanding checks drawn on that account. [11 F.R. 153.]
>
> * * *
>
> Sec. 24.1 *Meaning of terms used in this order.* * * *
>
> * * *
>
> (c) Definitions:
>
> (1) "Account" means a sugar ration bank account carried by a bank, in which the bank keeps a record of deposits of stamps, coupons,

and checks and of transfers of sugar ration credits.

* * *

(5) "Check" means a sugar ration check, in the form prescribed by the Office of Price Administration, drawn by a depositor against his account and made payable to the account of a named person.

* * *

(9) "Depositor" means a person who has a ration bank account. A person shall be deemed a separate depositor with respect to each of his accounts. [11 F.R. 164.]

STATEMENT

An eight-count information was filed against petitioner and the West Coast Supply Company in the United States District Court for the Southern District of California, charging violations of O.P.A. sugar rationing regulations. Four counts alleged the issuance, in violation of Section 15.7(d) of Third Revised Ration Order No. 3, *supra,* p. 2, of a sugar ration check for an amount larger than the balance in the account on which the check was drawn less the amount of outstanding checks drawn on that account. The other four counts charged the receipt, in violation of Section 2.9 of General Ration Order No. 8, *supra,* p 2, of specified quantities of sugar in exchange for the ration documents which had been unlawfully issued. (R. 2-8.)

The evidence may be summarized as follows:

Petitioner, a lawyer (R. 333) and a former O.P.A. ration board member (R. 122), together with his father and two brothers, operated a business in Los Angeles in which they manufactured and distributed bakery supplies under the name West Coast Supply Company (R. 333-335). The concern had three sugar ration accounts in the Union Bank and Trust Company of Los Angeles, denominated the wholesale account, the industrial account, and the processing account (R. 64), and petitioner was authorized to draw sugar ration checks on the accounts (R. 66-67).

In February 1944, petitioner and his father formed the John H. Ziegler Company, a partnership, which apparently took over the manufacturing operations of the West Coast Supply Company (R. 335), with the latter purchasing and distributing the manufactured products of the John H. Ziegler Company (R. 344), consisting of jams, extracts, and other commercial bakery products (R. 333). In July 1946, the daily sugar requirements in the manufacture of those products were about 47,500 pounds per day (R. 336). The John H. Ziegler Company, nevertheless, never had an official sugar quota (R. 336, 362, 406).

Despite the separation of functions between the two companies, they were closely inter-related. They operated adjoining, physically connected buildings (R. 255, 337). Petitioner continued to serve the West Coast Supply Company, devoting

himself, as before, to matters involving O.P.A. and other governmental regulations affecting the company (R. 335, 361; see also R. 73-74). Prior to July 1, 1946, petitioner purchased some sugar for the John H. Ziegler Company with ration checks drawn on the "ration point account" of the West Coast Supply Company (R. 362-366). Moreover, petitioner was listed as a partner in the latter firm in its registration with the Food and Drug Section, California Department of Public Health, and he stated to a representative of that agency that he was an "owner-partner" in the company (R. 145, 147). Likewise, although petitioner stated that the applications were made for the benefit of the John H. Ziegler Company, he described himself as a partner in the West Coast Supply Company in applications for increased sugar allotments made in the name of the latter firm prior to July 1, 1946 (R. 244-245, 372-378, 401-409). As late as August 1946, petitioner's brothers, one of whom was managing partner of the West Coast Supply Company (R. 265), referred to petitioner as the firm's manager (R. 272, 286; see also R. 284).

On July 1, 1946, petitioner placed orders for sugar, aggregating 1,370,000 pounds, with four different sugar companies through their respective brokers, Mailliard & Schmiedell, Sims-Thompson Company, Parrott & Company, and Kelley-Clarke Company (R. 125-126, 193, 165-166, 220-227, 349-350). When petitioner placed the first of the orders, that with Mailliard & Schmiedell (R. 349, 125-

126), he indicated that he thought sugar rationing was ended (R. 157), but Mr. Leland, representing that firm, informed petitioner that he (Leland) had different information and insisted on a ration check to cover the order (R. 128, 157). Accordingly, petitioner not only furnished a ration check to Mr. Leland, but also to each of the other brokerage firms with which orders had been placed (R. 130-132, 167-169, 197, 226). The last two lines of the forms on which the checks were written were as follows (R. 661-662):

.....
(Print or type name of your account)
.....
(Authorized signature)

When the checks were received by the Union Bank and Trust Company for posting, the words "West Coast Supply Company" or "West Coast Supply Co." were on the account line (R. 70-71, 84-85, 340-342).

At the trial, petitioner asserted that, although he signed the checks, they did not bear the name of the West Coast Supply Company when they were issued, and he in effect denied that he had authorized the addition of the name of that company when representatives of the brokerage firms questioned him relative to the account line on the checks being blank (R. 340-344). A representative of the Sims-Thompson Company testified, however, that, when the check sent to that company was received,

the check bore the name of the West Coast Supply Company as the account to be charged (R. 215). Similarly, a representative of Parrott & Company testified that petitioner had specifically authorized the addition of the name of the West Coast Supply Company on the penultimate line of the check form (R. 172-173). While there is no evidence as to who completed that line on the checks received by Mailliard & Schmiedell (R. 132) and the Kelley-Clarke Company (see R. 220-223), petitioner made no objection when a representative of the Union Bank and Trust Company informed petitioner that the check sent to the Mailliard firm had been reported to the O.P.A. as resulting in a large overdraft in the account of the West Coast Supply Company (R. 75-77). Moreover, petitioner specifically instructed the representative of the bank to "post it [the check sent to Parrott & Company] and show it as an overdraft and report it to the Office of Price Administration" (R. 78).

All of the ration checks furnished by petitioner were charged to the wholesale account of the West Coast Supply Company (R. 70).[1] The total of the highest balances on all of the accounts of that company following the issuance of the checks, without deducting them, was only 34,717 pounds (R. 79-80), and the final overdraft on the accounts after

[1] The checks did not specify the particular account to be charged (R. 662). However, petitioner had previously instructed the Union Bank and Trust Company that any check on which the account to be debited was not designated was to be charged to the wholesale account (R. 111).

the checks were posted was 1,351,804 pounds (R. 120). The West Coast Supply Company did not object to the checks being charged against its accounts (R. 100-101).

The sugar which was ordered by petitioner was addressed and billed to, and received on behalf of, the West Coast Supply Company (R. 133-135, 148-149, 159-162, 201-202, 255-262, 391). Part of the sugar, however, was delivered directly to an employee of the John H. Ziegler Company at its warehouse (R. 255). Petitioner paid for the sugar with checks drawn on the account of the John H. Ziegler Company (R. 355-356, 385-387, 395-399).

A motion for a judgment of acquittal was granted as to the West Coast Supply Company (R. 443), but a similar motion by petitioner was denied (R. 443-451), and he was convicted on all counts (R. 41, 641). He was sentenced to three months' imprisonment and fined $2,500 on each count, the imprisonment sentences to run concurrently. The execution of the jail sentences was suspended. (R. 44-45.) The judgment of conviction was affirmed (R. 677).

ARGUMENT

Petitioner's sole contention is that the Court of Appeals erroneously affirmed the judgment of conviction on the basis of evidence which tended to show that he was a partner in the West Coast Supply Company, although that issue had been excluded from the jury's consideration by the trial

court's instruction that the evidence was insufficient to prove that he was a partner in the company (R. 625). He argues in effect, therefore, that the Court of Appeals invaded the province of the jury, contrary to the decisions of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, and *Bihn* v. *United States,* 328 U. S. 633. (Pet. 10-20.)

This contention is without merit. The court below ruled (R. 664) that "The evidence * * * clearly showed that [petitioner] and his father and brothers did business under the name West Coast Supply Company" and "Whether they did so as partners or not is unimportant."

This was not a novel theory of the case announced, for the first time, by the appellate court. In the course of the Government's summation, a virtually identical statement was made: "The issue of his partnership or whether he is a partner has nothing to do with the present status of the case" (R. 597).

Petitioner's relationship with the West Coast Supply Company is said to be germane, first, to whether the accounts of the Company were sufficiently petitioner's accounts as to make him a "depositor" and the checks he wrote "checks" within the meaning of the ration order (Pet. 12); and second, whether receipt of sugar by the Company was receipt by the petitioner (Pet. 16). But the trial court did not exclude any evidence of the relationship between petitioner and the West Coast Supply Company for consideration by

the jury, except in so far as the evidence tended to prove that he was actually a partner in the concern (see R. 441). Moreover, the trial judge correctly instructed the jury as to the meaning of the word "check" as that term is defined in Section 24.1 (c)(5) of Third Revised Ration Order No. 3 (R. 624), and petitioner's counsel, in his final argument to the jury, pointed out the meaning of all other pertinent words in the regulations involved (R. 567-572).

Petitioner stated at the trial that he had the right to have the industrial account of the West Coast Supply Company transferred to the John H. Ziegler Company when the latter company was formed and that the transfer was not made because of the difficulty he would have had in purchasing sugar for a new concern (R. 404, 407-408). Prior to July 1, 1946, on which day the offenses of which he was convicted were committed, petitioner admittedly purchased sugar for the John H. Ziegler Company with ration checks made out in the name of the West Coast Supply Company, and he applied for increased sugar allotments in the name of the latter company for the benefit of the former company. Since petitioner's father and brother did not object to petitioner's drafts upon the West Coast Supply Company's account, the jury was justified in inferring that petitioner was actually a depositor, even though the account was carried in the name of the West Coast Supply Company. The

sugar was shipped to the latter company and paid for by petitioner. The fact of payment, plus the delivery of part of the sugar to the John H. Ziegler Company, indicates that petitioner was the beneficiary of the scheme.

Certainly, nothing in the charge of the trial court denied to the jury the right to decide that petitioner was authorized to, and did, deal with the account of the Company as his own.

CONCLUSION

The decision of the court below is correct. Involving, as it does, the peculiar facts in this record, there is, and can be, no conflict of decisions. And there is no other ground for the intervention of this Court. Consequently, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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